

**BEFORE THE INDIANA EDUCATION
EMPLOYMENT RELATIONS BOARD**

**NORTH MONTGOMERY TEACHERS
ASSOCIATION and MARY HODGE,**

Complainants,

and

Case Number: U-99-08-5835

**NORTH MONTGOMERY COMMUNITY
SCHOOL CORPORATION, *et al.*,**

Respondents.

HEARING EXAMINER'S REPORT

I.

Pursuant to the pleadings in the above-captioned case, upon the basis of the evidence adduced at the hearing in the North Montgomery High School library near Linden, Indiana, on January 11 and 12, February 2 and 3, February 29, and April 10, 2000, and upon her evaluation of the credibility of the witnesses, consideration of the post-hearing papers submitted by the parties, and the applicable law, the Hearing Examiner now makes the following:

Findings and Conclusions of Fact

1. The Complainant, Mary "Missy" Hodge, who signed the complaint for unfair practice herein under oath, at all times material, was a "school employee" of the North Montgomery Community School Corporation as defined by §2(e) of IC 20-7.5-1, Public Law 217-1973 ["Act"] and a "permanent teacher" as defined by IC 20-6.1-4-9, Public Law 100-1976 ["Tenure Act"] at Northridge Middle School.

2. The Respondent, North Montgomery Community School Corporation ["Corporation"], at all times material, was a "school employer" as that term is defined in §2(c) of the Act.

3. The North Montgomery Teachers Association ["Association"], at all times material, was a "school employee organization" as that term is defined by §2(k) of the Act and was the "exclusive representative" of the school employees of the Corporation as that term is defined by §2(l) of the Act.

4. At the time the complaint and amended complaint were filed, John Walker was a

“school employee” of the Corporation as defined by §2(e) of the Act and the president of the Association. At the time of the hearing, Glenda Frees was a “school employee” of the Corporation as defined by §2(e) of the Act and successor president of the Association.

5. At all times material, Linda Hurt was a “school employee” of the Corporation as defined by §2(e) of the Act and the Association’s building representative for Northridge Middle School.

6. At all times material, Dennis Renshaw was the Corporation’s “superintendent” as that term is defined in §2(d) of the Act.

7. At the time the complaint was filed, Michael Sowers was the principal of Northridge Middle School and a “supervisor” as that term is defined in §2(h) of the Act.

8. At the time of the hearing, Karla Cronk was the principal of Northridge Middle School and a “supervisor” as that term is defined in §2(h) of the Act.

9. At all times material, Cheryl Grant was the assistant principal of Northridge Middle School and a “supervisor” as that term is defined in §2(h) of the Act.

10. At all times material, Richard M. Cornstuble was the Indiana State Teachers Association [“ISTA”] UniServ Director and one of Hodge’s representatives.

11. Hodge commenced her teaching career in the Corporation at Cold Creek in January 1978. She was subsequently transferred to Darlington until Northridge Middle School was opened. At all times, Hodge taught math and, for a short period of time, physical education.

12. For almost twenty (20) years, Hodge was considered an acceptable, if not effective, teacher. However, several consistent shortcomings in her teaching were manifested from observations conducted by various supervisors throughout those years. Some of those shortcomings were a messy room, loose discipline, sitting at her desk rather than walking around the room helping students, preferential treatment toward some of the students, eating and drinking in the classroom, talking about students in front of the class, not sufficiently explaining the subject matter to the students, misgraded assignments, and sending students to run personal errands for her during class time. Nearly every supervisor observed that Hodge needed to move around the classroom more. A common theme throughout Hodge’s tenure was the judgment that she did not react well to criticism.

13. Hodge’s messy room through the years created several custodian complaints. One such complaint was formally lodged in January 1998 because the custodians had to get down on their hands and knees to pick up the debris before they could vacuum.

14. Renshaw, who had been the Corporation’s superintendent for four (4) years at the time of the hearing, claimed that he learned of Hodge his first year as the superintendent with

complaints about her classroom management, instruction, housekeeping, and grading inconsistency. In fact, on or about February 11, 1998, the superintendent met with a small group of parents concerning Hodge's performance. One parent who could not attend that meeting reduced her concerns to writing and forwarded it to the superintendent. Other parents complained to the superintendent or to the principal about Hodge's performance during the 1997-98 school year.

15. On May 13, 1998, Wes Hammond, Hodge's principal and supervisor at that time, sent a memo to Hodge outlining areas of concerns previously discussed but continuing to surface. He listed those concerns and laid out an improvement plan for Hodge to follow.

16. Hodge was among a few teachers identified prior to the 1998-99 school year as deficient. Building principals were to meet with those teachers and design a professional improvement plan. The superintendent knew that Hodge's principal would be meeting with her at the beginning of the 1998-99 school year as the concerns were serious enough to result in termination or conditional status.

17. Beginning with the 1998-99 school year, the Corporation adopted the Saxon mathematics curriculum for the middle grades.¹ According to the Saxon philosophy:

We believe that students learn by doing. Students learn mathematics best not by watching or listening to someone else, but by doing the problems themselves. **The focus of class time should be to provide the maximum opportunity for students to work productively on the prescribed problems.** (emphasis original)

We also believe that mathematics is not difficult, just different. In our program, mathematics is taught (and learned) just as a foreign language or musical instrument is taught: incrementally through continued practice. Thus the two most important aspects of the program are the incremental development of concepts and continual practice. Incremental development refers to the division of concepts into small, easily understood pieces that are taught over several lessons. A major concept is not taught in one lesson, but rather is developed over time. We do not expect a student to understand a concept completely the first time it is taught. Continual practice means that fundamental skills and concepts are practiced and reviewed throughout the year. Continual practice provides the time and experiences necessary for concepts to become a part of the student's long-term learning.

Most lessons can be taught in fifteen minutes or less. (emphasis added) Teachers should resist the temptation to lecture too long. Class time is used more effectively when students are working problems. Many of the skills in mathematics take a long

¹The Association was not involved as an organization in the selection of the textbooks. The first time the president had knowledge concerning the Saxon method occurred when he became involved with Hodge.

time to develop, and students must be given the opportunity to develop and master these skills with the practice provided in the problem sets. Each problem set contains only a few problems illustrating the increment presented in that lesson. The remaining problems, which become increasingly more difficult as the year progresses, provide practice of the concepts previously presented. The goal should be to complete one lesson or test per day.

18. For several years Hodge, along with another middle school teacher, would spearhead a trip with students to Washington D.C. during spring break. On September 4, 1998, the teachers again submitted a request for the trip. On September 11, 1998, Sowers denied the trip request based on an outstanding debt to the touring company from the last trip. On September 19, 1998, the teachers replied to Sowers' trip denial memorandum. In a three and a half page, single-spaced, typewritten memorandum, the two teachers explained the difficulties of fund-raising efforts and collecting for last year's Washington D.C. trip. Sowers believed the reply memorandum from the two teachers to be very unprofessional and inappropriate and so noted on Hodge's evaluation later that year.

19. Sowers observed Hodge's classroom on September 23, October 5, and October 13, 1998.

20. On September 24, 1998, a student was observed fetching water or tea for Hodge. On the same date, Sowers received a complaint from a parent about Hodge's messy and unorganized room. The parent's son could not function because the classroom was so loud and because so much "horsing around" took place.²

21. On October 15, 1998, Sowers received a complaint from a parent about Hodge being neglectful in supervising her class. While the child was sitting in his chair, other students were forcing him out of that chair into another. If the child did not move, the students would pick up his chair with him in it and move him to another location.

22. A few years earlier, Hodge was diagnosed as diabetic. Recurring related health problems were respiratory infections, pneumonia, obesity, high blood pressure, and sleep apnea. During 1998 and 1999, she was on a dietary regimen of eating at least four times a day and taking insulin twice daily.

23. On October 20, 1998, Hodge submitted a personal absence request for gastroplasty surgery to occur on or about November 23, 1998, and to continue for approximately four (4) weeks.³

²At no time did Sowers or the assistant principal solicit parent complaints. Whenever a parent verbally complained about Hodge, both suggested reducing the complaint to writing.

³The insurance company did not consider the surgery "elective" or "cosmetic" and approved the procedure.

Hodge had apprised Sowers of the surgery at the beginning of the school year and explained that she was just waiting to hear from the insurance company before scheduling the surgery date. On October 21, 1998, Sowers sent Hodge the following memorandum:

As per your request for leave of absence, I want you to submit by Monday a.m., October 26, 1998[,] a detailed written request to me and Mr. Renshaw, as to why you are requesting time off from school for “elective” surgery. You may place this in my mailbox at your convenience.

24. On October 20, 1998, Sowers asked that Hodge meet with him on October 21, 1998, to discuss his observation and evaluation of her. They met briefly on that date. When Sowers mentioned instituting “due process” and advised Hodge that she might want a representative, Hodge followed the advice; and the official meeting was postponed to October 27, 1998.

25. The Association held an executive board meeting on October 20, 1998. At that meeting, Hodge raised concerns about buses, the Washington D.C. trip, taking tickets at ball games, and being refused an athletic pass because she did not take tickets at ball games. Hodge had also been denied access to some of the equipment in the office because it was paid for out of athletic funds, and Hodge allegedly did nothing to earn the usage of the equipment. A short time later, Sowers called Hodge into his office and rebuked her for making public comments and criticizing and attacking him personally in public.⁴

26. On October 22, 1998, Hodge submitted a letter to Superintendent Renshaw requesting leave under the Family Medical Leave Act [“FMLA”]. Her physician also wrote a note explaining for when the surgery was scheduled and for how long Hodge would be off work. Sowers acknowledged the request on October 26, 1998, stating that he was “not authorized to approve or deny an absence for ‘elective’ surgery for this length of time.” He would let her know if any further documentation would be needed.

27. On October 27, 1998, Sowers, Grant, Cornstuble, and Hodge met concerning Hodge’s evaluation. Some of the concerns were with classroom management such as clutter, teaching competency such as instructing from her desk rather than moving around the classroom, classroom discipline, and professionalism such as excessive days out during the school year. Sowers advocated an improvement plan and set November 2, 1998, as a target date for pulling together the plan. In the meantime, Sowers required detailed lesson plans on a Friday for the following week’s lessons. Hodge was directed to “clean and organize her room” and to “remove all excess desks and chairs . . . not used on a daily basis.” Sowers ordered the cleaning and organization to be complete on or before November 6, 1998. Hodge was informed that the evaluation process in the parties’ collective bargaining agreement would be implemented to determine her status as a teacher in the Corporation.

⁴The alleged “attack” was not public since the comments were uttered during a closed union meeting.

28. Sowers met again with Hodge and Cornstuble on November 2, 1998. Hodge had a proposed performance improvement plan which included taking care of some of the clutter in her classroom, not using students to fetch tea or water, not reading students' grades in front of the class, and placing weekly lesson plans in Sowers' mailbox each Friday. The plan also included teaching less from her desk and utilizing a variety of teaching tools to enhance student learning. Hodge additionally agreed to take advantage of other teachers' offers to form a peer-evaluation and assistance committee. Sowers and Hodge agreed to meet on November 18, 1998, to assess the progress on the program and to make necessary changes. Hodge would have a representative present at that meeting.

29. According to Sowers, he never knew whether the Association or the ISTA would be representing Hodge, and he denied knowing who was the Association's building representative during 1998 or 1999. However, Hurt claimed that she, along with another teacher, informed him the first day of the 1998-99 school year that they would be the co-Association representatives.

30. Both Sowers and the assistant principal observed Hodge in separate classes on November 16, 1998.

31. Sowers and the assistant principal met with Hodge and Cornstuble on November 18, 1998, for a performance evaluation meeting. Part of the discussion centered on what Hodge should accomplish prior to leaving for surgery and while she was home recuperating. A part of Hodge's responsibility was to develop an improvement plan for the second semester.

32. On November 27, 1998, a parent complained that Hodge did not teach long enough and did not explain sufficiently how the answer was arrived at; consequently, the student was receiving poor grades. After the substitute teacher showed everyone on the chalkboard how to arrive at the answer, the student understood and was now receiving good grades. Another parent had similar complaints on December 18, 1998, and expressed a concern about Hodge returning to the classroom.

33. On January 11, 1999, prior to Hodge's return to work, a parent expressed a concern about the discipline in the classroom after Hodge returned.⁵ The complaint was also about Hodge's ability to teach.

34. Sowers entertained three parent complaints on January 16, 1999. All were concerned about Hodge returning to work, and all questioned her ability to teach.

35. On January 18, 1999, Sowers noted that Hodge had no lesson plans for the week of January 18 through January 22, 1999. Additionally, she had not prepared an improvement plan for the second semester as had been agreed to at the November 18, 1998, meeting.

⁵Hodge did not return to work until after January 14, 1999, because school was closed from January 4 through January 14, 1999.

36. On January 22, 1999, Sowers sent a memo setting a meeting for Monday, January 25, 1999, with Hodge because he did not understand her lesson plans.

37. On January 23, 1999, a parent complained of Hodge's poor teaching ability; and the parent remarked that if she had another child go through Hodge's class, she would hire a tutor.

38. On January 25, 1999, the Board of School Trustees ["School Board"] removed "interim" from Sowers' title of principal.

39. On January 26, 1999, another parent complained about Hodge's teaching ability.

40. Sowers observed Hodge's classroom again on January 28, 1999.

41. On January 29, 1999, Sowers sent a memo to Hodge requesting a meeting after a faculty gathering on that day. He merely stated that the meeting regarded "some items we need to discuss." According to Sowers' note appended to a memorandum about needed improvements:

Miss Hodge failed to make this meeting or to notify me that she was not going to attend the meeting. Miss Hodge was present at the school until approximately 4:00 p.m. which was plenty of time to conduct the meeting. Miss Hodge acknowledged the meeting at 7:50 a.m. requesting it be moved to an early time during the school day so that she may visit her friend. I told her there was no time during the day to meet and it needed to be after school. Miss Hodge [sic] comment was 'I'll call Rick [Cornstuble]' and walked away. Nothing else was said the rest of the day. I assumed we were meeting at 3:20 p.m. after the faculty gathering as I requested. I made arrangements with [the assistant principal] to be at the meeting[.] We waited to find that no one was going to show.⁶

[The] greatest disappointment is the lack of professionalism and courtesy to notify me that she was not going to make the meeting. This lack of professionalism and courtesy was noted on a previous evaluation as to an area that improvement was needed.

42. According to Hodge's handwritten notes, she received Sowers' memo on January 29, 1999, and asked him prior to 8:00 a.m. if the meeting could be rescheduled because she needed to leave town right after school. Sowers said he could not meet during her preparation period or before school. Hodge then called the Association president, who told Hodge that because of lack of notice and convenience, that she did not have to meet. Hodge also called Cornstuble. She then left a note in Sowers' box on Friday asking for a Monday meeting and explaining that Cornstuble needed more notice. Sowers later wrote to Hodge that he did not need for Cornstuble to be present at the January

⁶Sowers generally preferred meeting with Hodge before or after school rather than her preparation period.

29, 1999, meeting because the meeting was merely informational. E-mails were exchanged regarding rescheduling but were lost among other e-mails.

43. Items to be addressed at the meeting that did not occur on January 29 were outlined on a memo separate from the one requesting a meeting. Those items included parent complaints, the January 28 classroom observation, Hodge's cell phone that was left unattended in her classroom on January 27 when they were not to be in the view of students or used in school, the messy classroom condition, candy in the classroom, more improved lesson plans, and Hodge's improvement plan which was due upon her return to work.

44. On or about February 1, 1999, the assistant principal noted that Hodge had been scheduled to take tickets at the ball game but found a substitute without informing the assistant principal, even though Hodge had opportunities to do so.

45. On February 2, 1999, Sowers received another complaint in writing. The parents were having to teach basic math concepts to their child and questioned Hodge's teaching ability. By memo the same day, Sowers informed Hodge of the complaint.

46. On February 3, 1999, Hodge sent a note to Sowers that Cornstuble could not meet on that date but could meet on February 4. Sowers replied the same date that he could not meet on February 4. He further stated:

I am very frustrated about having this meeting as this is the second time I have tried to schedule it. It is fine if you wish to have Mr. [Cornstuble] there but his schedule seems to be a problem. I told you that this meeting was an informational meeting and it was not necessary for him to be there. I intend for the meeting to have the same agenda as was previously planned. I am rescheduling it for Friday, [February] 5, 1999, at 3:30 p.m.

47. On February 4, 1999, Cornstuble, by letter, wrote:

Missy has informed me that you have requested a meeting and it is her assumption that it relates to her performance and to her continued employment with the North Montgomery Schools. She has asked that I be present at any meetings where her performance is to be discussed. This is, of course, her right.

The letter further lists dates and times on which Cornstuble could be available. Sowers acknowledged receiving this letter by fax in a note dated February 5, 1999. In that note Sowers questioned what was wrong with the three prior dates and why he "did not receive cancellation notice until the day of and in many cases only two or three hours notice." He concluded this note with, "Again I am disappointed in the professionalism of Miss Hodge for her lack of communication to me as to the status of these meetings."

48. On Friday, February 5, 1999, by memo to Hodge, Sowers mentioned the meeting

times of January 29, February 3, and February 5 that he had attempted to schedule but was unsuccessful; therefore, he would have to create a paper trail when requesting changes. He then spoke of the rejected lesson plans for their lack of format, information, and detail. He claimed Hodge's lesson plans were "merely an outline of direction." He delineated what each daily lesson plan should include. Those were: 1. "Purpose, essential skills and proficiencies being met"; 2. "Agenda and time line"; 3. "Student objectives, Cognitive and Affective skills"; 4. "Procedures for what you are going to do and need"; 5. "Presentation outline"; and 6. "Outcomes for the students." He concluded with:

It is evident that improvement is needed in your lesson plans. I want you to rewrite your lesson plans and resubmit them to me by Tuesday, February 9, 1999[,] 8:00 a.m.

49. Hodge e-mailed Sowers on Monday, February 8, 1999:

I had understood from a previous meeting with you that my plans were okay. I had received positive feedback earlier from others on the staff when I asked for advice back in November. Therefore[,] I am not quite sure of the format you are expecting. Could you please refer me to someone in the building that could help me or their lesson plans that I could use as a guide?⁷ Thanks

50. By e-mail on February 8, Sowers replied:

If you would like to meet to [discuss] this[,] I would be happy to do this. We had set Monday[s] aside to work on your [improvement] plan. This was one of the reasons I had requested a meeting with you on the three prior dates. If you wish to do this[,] let me know.

51. A letter from a parent complaining about Hodge's poor teaching performance was addressed to Sowers on February 9, 1999.

52. On February 9, 1999, Sowers e-mailed Hodge setting a meeting for Wednesday, February 17, 1999.

53. On February 10, 1999, Sowers received a parent complaint written on February 9. The parent expressed frustration over her son's failing grades. He had received C's in sixth grade math. As with her two older children, if Hodge liked you, you got good grades; if not, you got bad grades.

54. One of the middle school teachers reported to the assistant principal on February 10,

⁷According to the Association president, Sowers was upset with other teachers helping Hodge with her lesson plans and cleaning her room. On the other hand, Hurt . . . with Sowers' permission . . . pulled together a team of teachers to help Hodge.

1999, that she believed Sowers was attempting to make everything so uncomfortable for Hodge that she would just quit. Sowers' demands were unreasonable, impossible, and constantly changing.

55. Sowers and the assistant principal met with Hodge and Cornstuble on February 17, 1999. Sowers explained that the meeting was informational. The first item discussed was the numerous parent complaints. The second item was proximity teaching with Hodge needing to move around the classroom rather than sitting at her desk. Third, Hodge was advised not to keep her cell phone out so students could see it. Fourth, Hodge was criticized for her messy room and pointed to the garbage Sowers had gathered from her room since her return to work. After Hodge's several excuses, Sowers reminded her that the garbage piled in his office was picked up off her classroom floor after she had left for the day. Fifth, Sowers directed Hodge to get rid of all the candy in her room. When Hodge argued that she used the candy as a reward, Sowers told her to find another reward. Sixth, Hodge's lesson plans were improved. Seventh, Sowers raised the issue of the improvement plan which Hodge was to work on while she was recovering from her surgery, but he had seen nothing. Hodge seemed not to understand, but they arrived at some elements that could be included in the improvement plan that would help improve her teaching. Finally, heated discussion occurred over Hodge's surgery which Sowers continued to insist was "elective" since he had no proof otherwise and her leaving the state during the time she was to be recovering.

56. At the conclusion of the meeting, Hodge and Cornstuble left to talk in Hodge's classroom. About an hour later, Sowers and the assistant principal went to Hodge's classroom to determine its condition. A lot of trash, such as candy wrappers and spit wads, was on the floor; and a bag of candy canes was sitting on the floor. Sowers picked up the trash.

57. On February 22, 1999, Hodge submitted to Sowers a handwritten improvement plan.

58. On February 26, 1999, parents complained about Hodge in writing to the assistant principal about their son's failing grade for the grading period. They had no knowledge until the fourth week of the grading period that their son was failing. They also complained that Hodge remarked on their son's bad grade in front of the class, that students failed tests but did not know what they had missed, and that Hodge spent very little time teaching.

59. Other parents complained about Hodge in writing on February 26, 1999. They questioned how an A-B student could "drop to an F in a matter of five weeks with no indication from the teacher that he was struggling." They complained about the short instructional time, not seeing what their son missed on tests, and lost homework their son claimed he turned in.

60. On March 8, 1999, Sowers e-mailed Hodge regarding a missing lesson plan and attempting to schedule a meeting for the coming Wednesday or Friday after school with respect to parent letters recently received.

61. On March 9, 1999, Sowers stopped by Hodge's classroom to see if she had started cleaning her closets as per her improvement plan deadline of June 3, 1999. He noted that she still had not removed all of the candy from her classroom when she had been ordered to do so on

February 17, 1999.

62. On March 11, 1999, Hodge requested a family illness day for Monday, March 15, 1999, to visit her fiancé in intensive care at Methodist Hospital in Indianapolis.⁸ According to the parties' master contract:

A teacher shall be entitled to be absent for reasons of family illness for a total of four (4) days during a school year. Family shall be defined as immediate family (mother, father, spouse, son, daughter) or any household member of the teacher. These days shall not be charged against personal illness days. An immediate family member who is ill is the only use for these days. They are not taken from personal illness days, nor do they accumulate. These are not 'personal' leave days. A family illness day may be transferred to a personal leave day if needed.

63. Sowers, along with the assistant principal, met with Hodge and Hurt, Hodge's teacher representative on Friday, March 12, 1999, concerning two parent complaints. Shortly after that meeting, Sowers followed Hodge into the workroom located in the office area. She became visibly upset when he asked her to change the family illness day to a personal leave day because his interpretation of the master contract was that a "any household member of the teacher" meant "dependent" member.⁹ No one else was present during that conversation. Hodge never asked for a representative.

64. A second letter, drafted on March 16, 1999, and received by Sowers on March 22, 1999, from parents, who had earlier complained, addressed how their son could have raised his grade from an F (48%) to a C+ in just two weeks. They wondered how many students were "lost because of her teaching skills and the fact that their parents aren't questioning those skills."

65. On March 17, 1999, Hodge filed a conduct report on a disrespectful student who talked out in class, yelled at his friends, cursed when warned about that over a period of several days, and asked Hodge personal questions in front of the class such as: Were you adopted? Is James Dean gay? When Hodge did not have a Kleenex, the student announced that he was going to "do a farmer's blow." Hodge did not refer the student to the principal or guidance but called the parent and left a message that she had written a discipline referral on her son. The parent later spoke with Sowers who read the referral to her. She expressed frustration with her son and his behavior and

⁸Hodge's fiancé lived in her house.

⁹Nothing in the record indicates that Hodge filed a grievance regarding the interpretation of "household member of the teacher."

frustration with Hodge's poor teaching.¹⁰

66. Near the end of the day, the assistant principal called the student, who had received a discipline referral, to her office for a "chat." He complained about Hodge calling kids dumb and stupid, not explaining how an answer was arrived at, and provoking kids into losing their temper.

67. At some point during March 17, a parent called Sowers to complain about Hodge not explaining the material to the students and not providing her daughter with enough information. She was especially displeased that she had had no prior warning about the poor grade for this six weeks.

68. On March 18, 1999, a student spoke with the assistant principal about an incident that had occurred in Hodge's room that resulted in his receiving a discipline referral. The student's parent complained in writing because Hodge never attempted to assist her son in retrieving his things from the other kids and because the other kids who started the incident were not punished.

69. That same evening another parent complained about Hodge to the assistant principal. Her son had lost his self-esteem and had become very negative about math, school, and teachers.

70. As the superintendent requested, on or about March 19, 1999, Sowers began compiling a list of documents from his working file pertaining to Hodge. This document was later updated on March 30, April 1, and April 14, 1999.

71. On or about March 19, 1999, Sowers commenced compiling a chronological listing of documents contained in Hodge's personnel file¹¹ as requested by the superintendent.

72. Another parent complained in writing that she had a message on the telephone from Hodge announcing that her son "was being loud and leaving class without permission." According to the son, another student took his pencil and agenda; and when he tried to retrieve them, Hodge told him to sit down and shut up. After he told her twice about the incident and she did nothing, he walked out of class. The parent felt that Hodge should have scolded the student who took her son's pencil and agenda.

73. Another parent complained on March 22, 1999, that her daughter reported that she was not learning in Hodge's class. No teaching occurred, assignments were given, and the answers provided. The parent also questioned Hodge's grading practices.

¹⁰This parent encouraged other parents to write letters complaining about Hodge. At no time did Sowers initiate or solicit complaints from parents or conduct a group meeting with parents.

¹¹The "personnel file" referenced to in Sowers' March 19, 1999, memorandum was in fact the working file housed in the principal's office as distinguished from the permanent personnel file in the superintendent's office.

74. A parent complained on March 24, 1999, that her daughter was distraught because she was failing math when she received A's and B's last year, and math had always been her favorite subject. The parent complained about Hodge not teaching concepts very effectively; and when students asked questions, she would become angry. Her daughter stopped asking questions because she did not want to get yelled at. Her daughter also observed that Hodge gagged a lot and spat in the wastebasket. She questioned why Hodge did not stay home if she was sick.

75. Article X, Reduction in Force, Section D, Recall Procedure, Subsection 11 of the master contract provides:

The teacher shall be notified of layoff in person by the Superintendent no later than April 1 of the school year the teacher is being terminated. The notice is to be followed by a certified letter within ten (10) calendar days of the personal notification by the Superintendent.

76. In complying with Article X, Section D(11) of the parties' master agreement, the superintendent had his secretary contact Hodge on March 26, 1999, to schedule a meeting prior to April 1. Shortly after the telephone contact with Hodge, Cornstuble called the superintendent to inform him that he would be representing Hodge and that a letter waiving the contractual time lines pertaining to the cancellation of her contract would be forthcoming.

77. On March 26, 1999, Cornstuble faxed the following letter to the superintendent:

This letter should serve as notice of the agreement of Mary Hodge and her representative Richard M. Cornstuble of the ISTA/NEA to extend any contractual timelines for the notification of Ms. Hodge concerning the cancellation of her permanent contract with the North Montgomery schools. The timelines in question are contractual timelines and not those specified under I.C. 20-6.1-4-11 or related statutes commonly called P.L. 110.

78. Walker, the Association president, met with the superintendent at the latter's request on March 29, 1999. At that meeting, the superintendent informed Walker of his conversation with Cornstuble. Walker indicated that the Association would be representing Hodge in the future. The discussion involved an emotional issue which could destroy the Association because of its limited resources; however, the Association would commit everything to Hodge's defense. Also mentioned in the discussion was the alleged personal vendetta Sowers had against Hodge due to her knowledge of Sowers' personal life and that pursuing this matter could result in ruining Sowers' marriage and his career. According to Walker, the meeting with the superintendent was Walker's first awareness that Hodge was in jeopardy of losing her teaching job.

79. Shortly after that meeting, the superintendent sent the following letter to Hodge:

I am in receipt of the letter prepared by Richard M. Cornstuble, ISTA UniServ director, agreeing to extend any Master Contract time lines for providing you notification of any intent to cancel your indefinite (Regular Teacher's) contract

with the North Montgomery Schools. Should the Corporation decide to pursue cancellation of your teaching contract, it will adhere to the time lines outlined in I.C. 20-6.1-4-11.

On Monday, March 29, 1999, I met with John Walker [Association] President, to discuss the procedures related to the possible cancellation of your contract. At that meeting Mr. Walker indicated that the [Association] would be representing you in this matter. Mr. Walker also stated that it was not necessary for me to meet with you in person prior to April 1.

80. A parent complained on March 30, 1999. According to this parent, his daughter was a member of the National Association for Gifted Children when she was home schooled and receiving A's in math. Under Hodge, she had been receiving C's. In addition, his daughter had been in Saxon math for years, and the teacher never taught a mere five (5) or ten (10) minutes but taught the students until they understood. Furthermore, the parent did not feel Hodge should be bringing her personal problems to the classroom. The parent was meeting with Hodge the next day and sought a meeting with the assistant principal after that appointment.

81. On March 31, 1999, Hodge met with the above-mentioned parents concerning their daughter. Following Hodge's parent conference, the parents met with Sowers and the assistant principal regarding their daughter's performance in Hodge's math class. In a memo to Sowers and the assistant principal, the parents presented a plan to collectively resolve their daughter's math grade. On the same day, Sowers held a parent conference from 5:30 to 6:45. According to the parent, Hodge did not teach, expected the students to learn on their own, and spent too much time on the internet. The parent questioned what coloring eggs had to do with math and complained that his son had no respect for Hodge.

82. Following the parent conference, Sowers went to Hodge's classroom to set up a meeting for the next morning. Hodge said she had students coming in for a make-up test before school and could not meet. Sowers would not meet with her during the day. Hodge and Sowers agree that the discussion centered primarily on parent complaints. Sowers preferred that Hodge not meet with parents; that she should refer the parents to him. Sowers told Hodge he would just draft line item complaints the following day and provide her with a copy. No one mentioned having a representative at that time. Sowers did not conduct an investigation, nor did he interrogate Hodge.

83. At 7:30 a.m. on April 1, 1999, Hodge e-mailed the following to the Association president:

Michael came in my room last night around 6:30 and said he needed to meet this a.m. about parent complaints. I had a make-up test scheduled with two students at 7:15 and couldn't meet. He said if parents contact me and want to meet that I have to refer them to the office so they can go through him?! He also said he couldn't tell me who or what the complaints were at this time. He would hold off until after spring break but will not be able to tell me who the parents are then either. I think he likes the

stress game.¹²

84. Walker responded with the following e-mail to the superintendent:

I received this from Missy this morning. It appears to the [Association] that Mr. Sowers is trying to harass and intimidate her by these threats. Does he need the secrecy so he can manufacture this information? Whatever he has needs to be discussed in the open with me present. Missy has cooperated with Mr. Sowers at every turn, even agreeing to a self-improvement plan that he has no right to implement or enforce because there is no provision for it in the contract. These are grievable offenses. I feel these items show the discrimination exhibited toward Missy Hodge. I want everything open and honest, and I want an end to the harassment immediately. Thank you!

85. On April 1, 1999, Sowers prepared a report of parent complaints, conferences, and letters. He prefaced the report with:

As per our short conversation on Wednesday, March 31, 1999[,] these are the main ideas, in line item form, of the 11 parent/student conferences and/or letters I have received since our last conference on March 12, 1999. The concerns expressed below are very much like the other concerns I have received throughout this year. I do not need to have a conference with you in [regard] to these concerns.

86. According to Hodge's Performance Improvement Plan ["Plan"], dated June 16, 1999, she did not show for a meeting planned for April 2, 1999. However, no letter or memorandum indicated a meeting for that day.¹³

87. Hodge did not receive the April 1 report of parent complaints, conferences, and letters until after spring break, approximately April 12, 1999.

88. Sowers received a parent complaint on April 12, 1999, which had been drafted on March 31, 1999. This parent was concerned about improper teaching methods and her child's struggle to understand the math concepts.

89. On April 12, 1999, Sowers sent a letter to Hodge setting a meeting for April 16, 1999, at 3:30 p.m. to discuss her evaluation. As in the past, Sowers invited the presence of an ISTA representative as well as an Association representative.

¹²Corrected editorially

¹³This could represent a typographical error because Sowers attempted to meet with Hodge on April 1, but Hodge had scheduled make-up tests for that morning when Sowers wanted to meet.

90. On April 13, 1999, another parent complained about the lack of teaching in Hodge's math class and the necessity of spending at least an hour each evening helping his child with homework because his child did not understand it.

91. On April 15, 1999, the Association and Hodge served the Corporation with an unfair practice which the Indiana Education Employment Relations Board ["IEERB"] received on April 16, 1999.

92. Sowers sent a memorandum to Hodge on April 15, 1999, postponing the April 16, 1999, evaluation meeting. A copy was provided to the ISTA representative and the Association president.

93. On April 16, 1999, the superintendent prepared the following letter:

You are hereby notified that the Board of School Trustees of North Montgomery Community School Corporation will meet in regular session on Monday, May 24, 1999, at 7:00 P.M., at North Montgomery High School, US 231 North, Crawfordsville, Indiana, to consider cancellation of your indefinite teaching contract.

The procedure to be followed and the rights accorded are stated in IC 20-6.1-11, a copy of which will be given to you upon request.

If you request, a written statement of the reasons for the consideration will be furnished within five (5) days. You may also file a written request for a hearing within fifteen (15) days following your receipt of this notice.

Failure to request a hearing within the above-specified timeframe will result in a waiver of any right to a hearing.

The letter was never delivered to Hodge.

94. Hodge was again observed in the classroom on April 19, 1999. On that same day, Sowers sent a memorandum to her scheduling May 3, 1999, for a meeting concerning her teaching status and evaluation. He would arrange for a substitute teacher beginning at 1:20 p.m.

95. Another classroom observation took place on April 21, 1999.

96. President Walker notified the superintendent on April 22, 1999, that the Association would be interested in viewing all materials contained in Hodge's personnel file. By separate letter on the same date, Walker advised Sowers that Michael C. Kendall of the Kendall Law Office would be representing the Association and that he would be contacting Sowers concerning Hodge.

97. On April 29, 1999, Sowers sent a memorandum to Hodge reminding her of the May

3, 1999, meeting concerning her teaching status and her evaluation. He informed her that the meeting would be held in the central administration office at 1:40 p.m. Nothing in the record indicates that this meeting occurred on that date.

98. In a letter to Walker, dated May 10, 1999, the superintendent outlined the dates of the evaluations contained in Hodge's personnel file. At that time, no other material was in her file.

99. Sowers completed Hodge's evaluation on or about May 11, 1999. Present at the May 11 evaluation meeting were the superintendent, the assistant superintendent, the assistant principal, Sowers, the Association president, and Hodge. Sowers recommended that Hodge be placed on conditional status for the 1999-2000 school year. He added:

You are [hereby] placed on notice that your job is in jeopardy. This coming school year, 1999/2000[,] there must be substantial and sustained improvement or I will recommend the termination of your employment.

Both Hodge and Sowers signed the evaluation on May 11 as a reflection of the report's content.

100. A parent complained on May 13, 1999, about a misreported grade on his daughter's report card. On May 19, 1999, another parent complained about Hodge not "doing her job."

101. Walker and Hodge submitted a rebuttal to her evaluation on May 21, 1999.

102. By letter dated May 26, 1999, a parent raised several concerns. Among those was a failure to distribute yearbook order forms. Hodge allegedly did not teach new material and became defensive when questioned. The parent's daughter complained that Hodge spent too much time in front of the computer addressing invitations and conducting personal business. According to the student, Hodge frequently did not relay announcement news.

103. The following letter was signed by Sowers and hand delivered to Hodge on June 3, 1999:

As you know, your most recent evaluation was completed on May 11, 1999. This evaluation documented a number of deficiencies in your teaching performance and resulted in a recommendation that you be placed on a conditional contract for the 1999-2000 school year, thereby placing your continued employment with the School Corporation in jeopardy. Please be advised that you will be placed on a performance improvement plan for the 1999-2000 [school year] in an effort to provide you with assistance and guidance to remedy the deficiencies identified in your evaluation. It is my hope that we work together cooperatively to develop a performance improvement plan for you. A copy of a draft improvement plan is enclosed with this letter for your review and input.

I would like to meet with you and your representative to review the proposed plan

and discuss any changes or revisions, as appropriate. I am available to meet with you and your representative on the following dates: I would appreciate it if you would confer with your representatives and let me know at your earliest convenience which of these dates are appropriate for you.

You must understand that you are in a job jeopardy situation, given my recommendation that you be placed on a conditional contract for the 1999-2000 school year. Please do not hesitate to contact me if you have any question about this correspondence or the enclosed documents.

104. The Plan began with Wes Hammond's identification of performance concerns regarding Hodge for the 1998-99 school year. Those concerns included, but were not limited to, Hodge's preferential treatment of certain students, failure to provide adequate explanations and instructions to students, late arrival to class, extra credit assignments, and administration of personal medication. The Plan itself listed a goal and outlined strategies for the following categories: The Teaching and the Learning Atmosphere, The Teacher Interacting with People, The Teacher as a Professional, Classroom Management/Condition, and Teaching Competency. Parent complaints were utilized in formulating the Plan. The Plan concluded with a schedule of dates for observations and progress assessment meetings for the 1999-2000 school year. The Plan also addressed accommodation issues under the Americans for Disability Act ["ADA"].

105. Sowers sent the following memorandum regarding parent complaints to Hodge on June 10, 1999:

I attempted to call you three times this morning in [regard to] parent letters. I have copied them and will keep them in my office. I would request that you contact me to let me know when you will be coming to view them. I do not want them taken from the office area and would request your professionalism in [regard] to discussion of these outside the office.

106. A meeting concerning the Plan was held on June 16, 1999, at which time Hodge signed the report.

107. The IEERB received the Complainants' amended complaint on June 22, 1999.

108. The parties' contract provides for advisory arbitration of grievances. At no time did the Association file a grievance on Hodge's behalf.

109. On February 2, 2000, the Hearing Examiner granted Complainants' *Motion for Leave to File Supplemental Pleading*, the substance of which follows.

110. On or about January 4, 2000, the IEERB issued a press release announcing a public hearing in the above-captioned case to be held on Tuesday, January 11 and Wednesday, January 12,

2000.

111. On or about January 7, 2000, several mentioned to Hodge the radio announcement about the public hearing for a “former” teacher. Believing the Corporation had provided the information to the radio station, Hodge walked to the office to speak with Cronk or the assistant principal; but they were unavailable. She proceeded to the office lobby where the school secretary noticed Hodge was crying and inquired as to why she was so upset. Hodge also had a substitute teaching form to submit. When Hodge said she needed to talk to Cronk and/or the assistant principal, the secretary reported that they were in conference. After Hodge returned to the classroom sometime after 10:00 a.m., the secretary notified Cronk and the assistant principal that Hodge needed to see both of them and appeared upset.

112. Prior to Cronk speaking with Hodge, she telephoned the superintendent about the radio announcement and the emotional state of Hodge. Cronk pulled Hodge out of the classroom and into another room to counsel her. According to Cronk, Hodge was very emotional and crying. Cronk assured Hodge that the Corporation had not released any information to the radio station . . . that she had already spoken with the superintendent who had heard the same radio announcement. Much of the conversation centered on Hodge’s questioning her being the center of the public hearing with Cronk merely informing her that the matter was in Hodge’s hands . . . that the Corporation was the “defendant.” Cronk never told Hodge to drop the complaint, but she did tell Hodge that “the ball was in her court.” Cronk was satisfied that Hodge could return to the classroom.

113. Not knowing Cronk had spoken with Hodge, the assistant principal approached Hodge following lunch. They talked in the teacher’s lounge. According to the assistant principal, Hodge was crying most of the time they were talking. As with Cronk, Hodge could not understand why the case was going forward. The assistant principal informed Hodge that she probably was the only one who could withdraw the complaint since she was the one who filed.

114. Neither Cronk nor the assistant principal threatened Hodge. Nor did either make a promise to Hodge if she would withdraw her complaint. Both acted in the capacity as personnel counselors to an emotional teacher.

115. At no time during the conversations with Cronk or the assistant principal did Hodge request a representative.

Issues

I.

Did the Corporation commit an unfair practice by refusing Hodge union representation?

II.

Did the Corporation deny Hodge due process by evaluating her teaching performance through parent complaints and, therefore, commit an unfair practice in violation of the collective bargaining agreement and the Act?

III.

Did the Corporation commit an unfair practice when it enforced an improvement plan on Hodge purportedly in violation of the collective bargaining agreement and in violation of the Act?

IV.

Did the Corporation violate §7(a)(4) of the Act when Principal Cronk and the assistant principal spoke with Hodge about the unfair practice?

Discussion

I.

The Association contends that the Corporation committed an unfair practice by failing to provide Hodge with a representative on at least three occasions. The first occasion allegedly occurred on October 21, 1998, concerning her evaluation; the second involved a request for family illness and an attendant meeting in the copy room on March 12, 1999; the third claimed occurrence was March 31, 1999, when Sowers came to Hodge's room after school hours.

The paucity of IEERB case law in this area is demonstrative of school corporations and teacher unions respecting the rights of school employees who find themselves in a disciplinary situation.¹⁴ In *Fort Wayne Community Schools*, 1977 Ann. Rep. 254, the principal sent a written notice to a teacher to appear in the principal's office at 2:44 p.m. on May 10, 1977. The teacher requested through the Fort Wayne Education Association ["FWEA"] representation for that meeting. The FWEA sent two representatives. The principal refused to allow the representatives to enter the meeting. The principal had announced that the purpose of the meeting was to mediate a dispute between two teachers, not for disciplining the two teachers.

According to the hearing examiner:

The issue is whether or not [the teacher] had the right to have a union representative present during her meeting in the [p]rincipal's office. The test is clear. '[T]he

¹⁴Another compelling reason can be found in *Weingarten*, *infra* at 21. The basic principles in *Weingarten* clearly define the administrative parameters of union representation in disciplinary actions. As a result, most school administrators and union representatives know exactly how *Weingarten* should be applied in the day-to-day operation of the school.

employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.' *National Labor Relations Board v. J. Weingarten*, [88 LRRM 2689] 420 U.S. 251, 95 S.Ct. 959 (1975). However, the employee's reasonable belief must be based on objective standards--not merely on the employee's subjective standards.

Id. at LRRM 2691. The hearing examiner held that since the purpose of the principal's meeting was not disciplinary, as announced in advance by the principal, and that no discipline would result, the function of mediating a dispute between two teachers was an administrative function; therefore, the teacher was not entitled to union representation and no unfair practice was committed.

In *Weingarten*, management interviewed an employee during the course of investigating charges that the employee had stolen from the store. While the employee requested the presence of a union representative during the interview, that request was denied. The Supreme Court held:

The action of an employee seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'¹⁵ (citation omitted) This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. (footnote omitted) The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview.

Id. at LRRM 2692.

The basic *Weingarten* principles defining the scope of the right to union representation are:

¹⁵*Cf.* §6, the relevant part of the Act which parallels the federal statute:

School employees shall have the right to form, join, or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing, and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits, and other matters as defined in sections 4 and 5 of this chapter.

- ! The right of an employee to union representation only arises in situations where the employee *requests* such representation.¹⁶ The employer has no duty to inform the employee of the right. An employee need not adamantly insist on union representation; however, silence may be construed as a waiver. There is no right to a specific union representative if that representative is unavailable. The employee has a right to consult with his or her representative before an investigatory meeting, if requested by the employee or representative.

- ! The right to representation applies only in situations where an employee reasonably believes the investigation will result in disciplinary action or place the employee's job in jeopardy. The right to representation arises when a significant purpose of the meeting is to obtain facts to support disciplinary action. A meeting called simply to announce a decision to take disciplinary action or to "voice complaints" about the employee's performance does not trigger the right to representation. The employee is not entitled to representation if he/she is assured that no disciplinary action will result from the interview. Whether or not the employee is entitled to a union representative, the employee may not be disciplined or discriminated against solely because of making the request.

- ! The exercise of the right to representation may not interfere with legitimate employer prerogatives.

- ! The employer may choose to carry on its inquiry without interviewing the employee. In any event, it is not within the employee's right to refuse an order to report to a supervisor's office.

- ! The employer has no duty to bargain with the representative who attends the interview.

Sowers met briefly with Hodge on October 21, 1998, to review with her the most recent evaluation. Because of the evaluation and the potential for initiating due process or job jeopardy, Sowers advised Hodge that she might want representation. She accepted that advice, and the meeting was postponed until October 27, 1998. Not only did Sowers give advance notice to Hodge that her job might be in jeopardy, he also recommended that she have a representative present.¹⁷ Therefore, the October 21, 1998, meeting did not violate Hodge's *Weingarten* rights.

¹⁶The employee has a right to consult with his or her representative before an investigatory meeting where an employee might reasonably fear the result could be discipline, if requested by the employee or representative. *Climax Molybdenum Company*, 227 NLRB 1189 (1977)

¹⁷Clearly, under the facts of this case, Sowers had no duty to advise Hodge of her right to representation.

Critical to whether or not an employee has been denied the right to representation is that the employee reasonably believes the investigation will result in disciplinary action or place the employee's job in jeopardy. The confrontation in the workroom on March 12, 1999, was not an investigation. Sowers was merely performing an administrative function pertaining to usage of a family illness versus personal day. The reasonable belief must be objective. Hodge could not have reasonably believed the investigation would put her job in jeopardy because she knew that the confrontation concerned whether the day would be one of family illness or personal, not discipline. Another critical element in determining whether or not an employee was denied union representation is whether that employee requested representation. Here, Hodge never requested representation. As a result of failing to request representation and lacking a reasonable belief that the confrontation would result in discipline or job jeopardy, the Corporation did not violate Hodge's *Weingarten* rights.

On March 31, 1999, at approximately 6:45 p.m. Sowers went to Hodge's room to set up a meeting for the following day. Both Hodge and Sowers agree that the issue was the scheduling of a meeting pertaining to parent complaints. Again, Hodge lacked a reasonable belief that the discussion after school would result in discipline or place her job in jeopardy. She knew that the conversation centered on *scheduling a date* to discuss parent complaints. The discussion was not an investigation but merely an attempt to schedule an informational meeting regarding parent complaints. Once more, Hodge did not request a representative. Hence, the Corporation did not violate Hodge's *Weingarten* rights.

II and III¹⁸

The Association first contends that the Corporation denied Hodge due process by evaluating her teaching performance through parent complaints. Second, the Association contends that the Corporation committed an unfair practice when it enforced an improvement plan on Hodge. In both instances, the Association argues that the Corporation violated both the Act and the collective bargaining agreement.¹⁹ The Corporation's principle argument is that no unfair practice can occur where solely an individual grievance is alleged.

The Corporation's argument is key to determining whether further discussion is needed. Clearly, due process and the use of parent and student complaints in evaluating teachers is a subject of §5 discussion under the Act. In addition, the evaluation process as it affects all teachers in the bargaining unit is a subject of §5 discussion under the Act. However, in the present case both contentions pertain to only one teacher--Hodge.

¹⁸These issues are consolidated for purposes of composition.

¹⁹No rationale behind these contentions was proffered since the Association failed to file a timely brief.

The court in *Carroll Consolidated School Corporation*, 439 N.E.2d 737 (Ind. App. 1982) sought to clarify the scope of the §5 discussion mandate. After adopting the court's earlier interpretation of §5 set forth in *Delphi Community School Corporation*, 368 N.E.2d 1163 (Ind. App. 1977), the court stated:

“‘Section 5 of the Act clearly contemplates that the discussion of the factors enumerated therein are to be on behalf of all members of the school employees’ bargaining unit.’ 368 N.E.2d at 1168. We agree.”

Carroll at 739. The court continued to articulate its interpretation of the scope of the §5 discussion mandate:

Discussion under Section 5 contemplates the mutual exchange of points of view regarding general conditions or overall guidelines applicable to, insofar as here pertinent, the ‘selection, assignment or promotion of personnel.’ (citation omitted) Although discussion of individual cases *as examples* may aid in examining policy, there should be no obligation to discuss these individual cases before action is taken or to take an individual grievance to the discussion table. There is ample provision in the law for the establishment of a grievance procedure. (citation omitted) (footnote omitted) (court’s emphasis)

Carroll at 739.

The IEERB has resolutely adhered to the principles established in *Carroll* and *Delphi*. For example, see *Decatur Township*, U-82-31-5300, 1982 IEERB Ann. Rep. 394 (1983) where an individual school employee was not selected as the social studies department chairperson; *Shakamak*, U-84-41-2960, 1985 IEERB Ann. Rep. 115 (1985) where an individual school employee was not assigned or promoted to an extracurricular golf coaching position; *Tippecanoe Valley School Corporation*, U-85-18-4445, 1985 IEERB Ann. Rep. 98 (1985) where an individual, nonrenewed school employee’s working conditions were changed to improve teaching performance; *Blackford County School Corporation*, U-87-09-0115, 1987 IEERB Ann. Rep. 33 (1987) where an individual school employee sought to have an art show removed to Indianapolis and was issued administrative directives to be followed or face insubordination; *Hanover Community School Corporation*, U-94-24-4580, 1995 IEERB Ann. Rep. 165 (1995) where an individual school employee sought to have her retirement resignation rescinded; and *Marion Community Schools*, U-93-39-2865, 1997 IEERB Ann. Rep. 101 (1997) where a teacher was presented with a remediation plan which extended an April 25 deadline, established in school board policy pertaining to evaluation, to June 1.

Clearly, Hodge was the only actor in a one-act play. Most of the rhetorical paragraphs in the amended unfair practice complaint focus strictly on the individual grievance pertaining to Hodge alone. The Prayer for Relief reinforces the individual nature of the complaint:

WHEREFORE, the Petitioners respectfully pray that the Board [o]rder the Respondent to cease and desist from committing an[y] further unfair labor practices

upon the *Petitioner, Ms. Hodge*, and for all other applicable relief as provided for by law, as the Respondent has knowingly and willingly violated *specific terms and conditions of the Master Contract Between the Board of Education of the North Montgomery Community School Corporation and the North Montgomery Teachers Association*. (emphasis added)

In the present case, no evidence emerged which would convince this Hearing Examiner that evaluating Hodge's teaching performance through parent complaints and enforcing upon her an improvement plan affected any other bargaining unit member. The evaluation procedure that was followed had been discussed with the Association. The procedure provided for a "conditional status" contract for those teachers in job jeopardy. By inference, "conditional status" contemplates an improvement plan short of termination as a last chance. Hence, no failure to discuss under *Evansville-Vanderburgh* can be lodged against the Corporation.

Again, *Carroll* certifies that "[t]here is ample provision in the law for the establishment of a grievance procedure." The court then refers to §2(o) of the Act which sets forth the discussion obligation and further protects individual employees with the following right:

"Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of the employee's grievances either individually or through the exclusive representative, . . ."

Here, Hodge filed no grievance protesting the enforcement of an improvement plan or the use of parent complaints for evaluation purposes, thereby exercising her right under §2(o) of the Act.

IV.

Under §7(a)(4) of the Act, "[I]t shall be an unfair practice for a school employer to:

discharge or otherwise discriminate against a school employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter."

The Association claims that a violation of the Act occurred when Principal Cronk and the assistant principal discussed the unfair practice, and the events surrounding the complaint, with Hodge on January 7, 2000, prior to the January 11, 2000, hearing. According to the Corporation, the Complainants have failed to meet their burden of proving an unfair practice of discrimination occurred referring to *SSU Federation of Teachers, Local 4195 v. Madison Area Educational Special Services Unit*, 656 N.E.2d (Ind. Ct. App. 1995) applying *McDonnell Douglas Corporation v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817 and *Texas Department of Community Affairs v. Burdine* (1981), 450 U.S. 248, 109 S.Ct. 1775. Madison SSU had been accused of committing unfair practices against a teacher when it transferred him because of his union activities. According to the court, "*McDonnell Douglas* and *Burdine* apply when the employer's proffered reasons for disparate treatment of the employee are claimed to be merely a pretext for discrimination. Summarizing the

McDonnell Douglas standard, the Court stated:

‘First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.’

Burdine at 450 U.S. 252-53.

Neither Hodge nor the Association were able to show by a preponderance of the evidence that she was the subject of discriminatory treatment. According to the record, Hodge learned that she was the subject of a radio announcement which led listeners to believe that she had been terminated. Upset, she sought counsel with Principal Cronk and the assistant principal. Both were in conference at the time she spoke with the school secretary. Upon hearing about Hodge’s emotional state, Principal Cronk went to Hodge’s classroom to speak with her. Later, the assistant principal spoke with Hodge about the radio announcement. Neither Principal Cronk nor the assistant principal threatened Hodge or promised her anything. Furthermore, neither took any action with respect to the conversation. Both comforted a distraught teacher and answered her questions. Hence, the first test wherein the Complainants had “the burden of proving by a preponderance of the evidence a prima facie case of discrimination” must fail. Since the Complainants failed to meet their burden of proof, the Corporation did not commit a §7(a)(4) violation of the Act.

Conclusions of Law

1. The Indiana Education Employment Relations Board has jurisdiction over the parties and the subject matter in dispute.
2. The Corporation did not refuse Hodge union representation and thereby commit an unfair practice.
3. The Corporation did not deny Hodge due process by evaluating her teaching performance through parent complaints and, therefore, committed no unfair practice because Hodge’s claims regarding evaluation through parent complaints were individual grievances; therefore, Hodge has no recourse under the Act with respect to those claims.
4. The Corporation did not commit an unfair practice when it enforced an improvement plan on Hodge since the improvement plan pertained to an individual grievance and, therefore, not actionable under the Act.
5. The Corporation did not violate §7(a)(4) when Principal Cronk and the assistant principal spoke with Hodge on January 7, 2000.

Pursuant to the Rules of the Indiana Education Employment Relations Board, and specifically Rule 560 IAC 2-3-21(a), this case is transferred to the Indiana Education Relations Board.

To preserve an objection to the Hearing Examiner's Report, a party must object to the Report in a writing that identifies the basis of the objection with reasonable particularity. Such writing must be filed with the Indiana Education Relations Board within fifteen (15) days after the Report is served on the petitioning party. *See* IC 4-21.5-3-29(c) and (d); 560 IAC 2-3-22 and 23.

Dated this _____ day of September, 2001.

Janet L. Land
Hearing Examiner